

Alternative Protocol C

Preface

This protocol is arguably “Stockhammer-based” because it does not require a motion judge or a trial judge to *inspect* third-party records in order to make a determination of relevancy.

A. Relevancy

However, judicial relevancy determinations in this protocol occur at two points. First, at the outset of the process, when the defendant files a motion seeking the court’s permission to subpoena¹ third party records, defense counsel must establish to the court’s satisfaction that the records may contain information with a “rational tendency to prove or disprove an issue in the case.” Commonwealth v. Lampron, 441 Mass. 265, 269 (2004). If the motion judge finds that a sufficient relevancy showing has been made, the records are subpoenaed (step 1).

Second, when the defendant seeks to disclose the records, either for pretrial preparation (e.g., evaluation by a potential defense expert witness) or at trial, the defendant must first seek and obtain the permission of the court (steps 6 and 8). If the court finds that the records are appropriately relevant, the court may order that the records be disclosed to an expert, who would then also be subject to the protective order. If the court finds that the records are relevant to an issue in the case and otherwise admissible, they are admitted in evidence at trial (step 8).

This protocol requires that inspection of the records be conducted by counsel, subject to a protective order. Thus defense counsel, the person most knowledgeable and least likely to overlook exculpatory evidence, performs this task. Serious enforcement of the protective order guarantees that the witness’s privacy interest is not invaded beyond the extent necessary to

¹ The term “subpoena” is utilized as shorthand in this preface for “court order for production of records.”

provide the defendant a fair trial.

B. Privilege Determination

Informed by Lampron, supra, this protocol draws no distinction at the outset between the subpoena of records which may be privileged and those which are probably not privileged. If the court orders that the records be produced, they are made available for inspection by counsel subject to a protective order (step 5). Those records to which a privilege has been claimed either by the witness or by the record holder are subject to a protective order (step 5 and form C). If, at some point after inspection, defense counsel finds that pretrial preparation is unduly hampered by the protective order and further believes that the records in question are not privileged, a request may be made for a judicial determination of privilege (step 7).

C. Record Holders

If the court determines that a subpoena for third-party records should issue, the record holder is advised in detail of the provisions governing response to the subpoena. These provisions are included in Form B, attached to the protocol. The protocol requires that every subpoena issued by the court be accompanied by Form B. Record holders who wish to assert a privilege are instructed precisely how to do so (step 3). In the event that counsel later seeks a judicial determination of privilege, the record holder is given notice of the hearing and may appear and be heard (step 7).

D. Witness

The witness whose records are sought by the defendant is advised at the outset of the motion for production of records of the witness's right to assert or waive any privilege, and of the witness's right to be present on the date of the hearing (step 2). The witness is advised of the

right to be present at any subsequent hearing on record-holder objections to the subpoena (step 4). The witness is also advised of the right to be present in the event a hearing is conducted to determine whether the records are privileged (step 7).

Protocol

Documents, books, papers or objects [hereinafter "records"] held by third parties may be obtained prior to trial by defendants in criminal cases subject to the following procedures.

Commentary: Mass. R. Crim. P. 17(a)(2) governs pretrial production of "books, papers, documents or other objects." For ease of exposition, these items will henceforth be referred to generically as "records." This protocol does not address the circumstances in which the Commonwealth may file a motion pursuant to Mass.R.Crim.P. 17(a)(2).

1. Motion for Order to Produce Records

- a) The defendant must file a motion requesting an order for production of records from a third party. The defendant's motion shall be accompanied by an affidavit setting forth his reasons for seeking access to the records. The Commonwealth shall be served with a copy of the defendant's motion and affidavit.
- b) The Commonwealth shall file any response to a motion for an order to produce records within fourteen days of filing of the defendant's motion.
- c) A hearing on the motion shall be conducted no later than thirty days after the filing of the defendant's motion.
- d) Prior to the filing of his motion for production of records, the defendant may file a motion and supporting affidavit requesting permission to file these pleadings ex parte. The court shall conduct a hearing on the motion. The motion and affidavit to proceed ex parte shall be impounded by the clerk of the court. The Commonwealth shall be served with a copy of the

defendant's motion and affidavit to proceed ex parte, redacted as ordered by the court, and shall in the usual case be present for the hearing. Upon good cause shown, the court shall order that the motion to proceed ex parte and supporting affidavit be impounded by the clerk of the court.

Commentary

a) *Commonwealth v. Lampron*, 441 Mass. 265 (2004), requires defendants seeking records held by third parties prior to trial to comply with the requirements of Mass. R. Crim. P. 17(a)(2). See also *Commonwealth v. Lam*, 444 Mass. 224, 228(2005). The defendant's motion and affidavit must set forth his reasons for believing (i) that the contents of the records sought will have a rational tendency to prove or disprove an issue in the case, (ii) that the records sought are not otherwise procurable in advance of trial, (iii) that failure to produce the records prior to trial may result in an unreasonable delay during the course of trial, and (iv) that the request is made in good faith. *Lampron* at 269. See also *Lam* at 230-231.

The affidavit may contain and may rest upon reliable hearsay. *Lampron* at 271. Typically the affidavit will rely upon discovery mandated by Mass.R.Crim.P. 14, including, for example, police reports, grand jury minutes, witness statements and criminal records of the Commonwealth's witnesses. *Commonwealth v. Bushway*, 442 Mass. 1035, 1036-1037 (2004). The affidavit may also rely upon discretionary discovery ordered by the court pursuant to Mass.R.Crim.P. 13(d). The defendant may file a memorandum of law citing relevant authority.

The motion must specify the name and address of the record holder and must designate, as particularly as possible, the records sought, including designation of the relevant time frame. Unless circumstances dictate otherwise, requests should not encompass all records held by the record holder, but should be limited to the time frame relevant to the allegations and to the defense of the case. See *Lam* at 231-232 (defendant's request for school records overly broad); *Lampron* at 270.

c) Scheduling the hearing when the motion is filed assures that the witness whose records are sought receives adequate notice of the date of the hearing, that the defendant's trial preparation is not unduly delayed, and that production and review of the records, if required, can be accomplished within the dates established by the applicable tracking order. When feasible, the hearing shall be held on the same date as any discovery compliance hearing scheduled pursuant to Mass.R.Crim.P. 11(c).

d) *Commonwealth v. Mitchell*, SJC No. 09472 (July 29, 2005), authorizes the ex parte filing of a motion and affidavit for production of records when disclosure of the motion and affidavit creates a reasonable likelihood of either (a) the destruction or alteration of the documents sought, or (b) disclosure of incriminating information.

The court must hold a hearing on the motion to proceed ex parte at which both the defendant and the Commonwealth are heard. A stenographic record must be made of all proceedings relating to the filing of an ex parte motion. *Mitchell* at .

2. Notice to Witness

The court shall issue a notice to the person whose records are sought (hereinafter "the witness") on a Form to be designated as Form A. The notice shall inform the witness of the filing of the motion for production of the records, of the date for the hearing on the motion, and of the witness's right to assert or to waive a privilege. Unless the court orders otherwise, the Commonwealth shall transmit the notice to the witness.

Commentary

G.L. c.258B, §3(g) provides that a complainant in a criminal case must have an opportunity "to confer with the prosecutor...before any hearing on motions by the defense to obtain psychiatric or other confidential records." In the event the witness whose records are sought is not the complainant, the court may make an order as to the manner in which the notice contained in Form A shall be transmitted to the witness.

3. Hearing on the Motion for an Order to Produce Records and Order for Production.

- a) The court shall conduct a hearing on the defendant's motion for an order to produce records. If the court determines that the requirements for issuance of the order have been satisfied, the order shall issue within fourteen days of the hearing.
- b) The order shall designate a return date for production of the records and shall be accompanied by a copy of Form B, instructing the record holder of the proper manner for responding to the order.
- c) If the witness has asserted or waived a privilege, the court shall provide the record holder with a copy of the assertion or waiver.

Commentary

In order to expedite pretrial production of records held by a third party, the record holder must be notified at the outset and in detail of all provisions governing response to a court order for the production of records. A statement of the governing provisions, attached to this rule as Form B, must accompany every order for production of records.

4. Hearing on the return date of the court order.

- a) The case shall be placed on an administrative list for determination whether the records have been received on the day after the return day on the court's order.
- b) Copies of any records produced in response to the order as to which no claim of privilege has been made by the record holder or by the witness shall be made available to defense counsel and the Commonwealth forthwith.
- c) If a record holder files a motion to vacate or to modify the order on the grounds that production of records would be unreasonable or oppressive, the motion must be accompanied by an affidavit. The court shall conduct a hearing to address these claims. The defendant, the Commonwealth, the record holder and the witness shall be notified of the date of the hearing.
- d) If the records have not been produced on the return date and no motion to vacate or modify the order or to extend the time for production of the records has been filed, an order to show cause shall issue scheduling a contempt hearing in seven days.

Commentary

c) Mass.R.Crim.P. 17(a)(2) permits a challenge to a subpoena "if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of Rule 14 [of Mass.R.Crim.P.]." Production of records is unreasonable when the records are plainly unrelated to the allegations against the defendant or to the credibility of a witness. See United States v. Construction Products Research, Inc., 73 F.3d 464, 471 (2nd Cir. 1996) (production of documents is reasonable when documents sought "may be relevant" to a "legitimate purpose"), and cases cited therein. Production of records is oppressive when the request is excessively broad and when production would create insuperable logistical problems. See Commonwealth v. Oliveira, 438 Mass. 325, 340 (2002) (a summons "sufficiently well defined and not overly broad" is not oppressive); Margoles v. United States, 402 F.2d 450, 451 (7th Cir. 1968) (subpoena for all local Federal Bureau of Investigation equipment logs overly broad and therefore oppressive); In Re: Grand Jury Investigation, 746 F.Supp. 866, 867 (E.D.Wis. 1990) (subpoena for over 9,000 linear feet of documentation oppressive).

Any objection to production of the records on the grounds that production would be unreasonable or oppressive must be made by a motion to vacate or modify the order, accompanied by an affidavit stating the reasons in support of the claim. Any supporting memorandum must be filed with the motion and affidavit.

5. Inspection of records by defense counsel and Commonwealth.

Records produced in response to the court's order as to which a claim of privilege has been made shall be reviewed by defense counsel and by the Commonwealth at the office of the clerk of the court. The records may not be copied without the permission of the court. The court shall issue a protective order as set forth in Form C, barring disclosure of the records to any third party without the permission of the court.

Commentary

In a departure from certain previous approaches, no in camera judicial review of records produced by third parties is required at this stage. The defendant is required at step 1, supra, to make a showing under Lampron that the records sought may contain information with a rational tendency to prove or disprove an issue in the case. If the court determines that the Lampron standard has not been met, the defendant's quest for access to the records is over. If the defendant meets the Lampron standard, defense counsel is in the best position to assess which parts of the records in fact contain information helpful to the defense. The records are subject to a protective order, which prohibits both defense counsel and the prosecutor from disclosing the contents of the records without the permission of the court.

If the court permits either party to copy portions of the records, the copy may not be copied without the permission of the court, and all copies of the records must be returned to the clerk of the court at the conclusion of the case.

If no claim of privilege has been made, the records are not subject to a protective order and copies may be made by the defendant and by the Commonwealth pursuant to section 4(b) of this Rule.

6. Disclosure of records to third parties prior to trial.

(a) Defense counsel or the Commonwealth may file and must serve on the opposing party a motion for leave to disclose the records to an investigator, to an expert, or to any third party prior to trial. The motion must be accompanied by an affidavit explaining why pretrial disclosure is necessary to adequately prepare for trial.

(b) The opposing party must file its response to the motion within seven days of filing.

(c) The court shall conduct a hearing and issue an order on the motion.

Commentary

(a) *Defense counsel or the Commonwealth may seek to disclose information from third party records to investigators, experts, or other persons to assist in trial preparation. See Commonwealth v. Bishop, 416 Mass. 169, 182 (1993), and Commonwealth v. Syrafos, 38 Mass. App. Ct. 211, 214-217 (1995).*

Defense counsel may request permission to disclose the contents of third party records to the defendant, to enable the defendant to participate in trial preparation.

7. Privilege determination.

(a) The defendant may file and must serve on the Commonwealth a motion for a hearing to determine whether records as to which a claim of privilege has been made are in fact privileged.

The motion must set forth reasons for believing that the records are not privileged, and reasons why pretrial preparation is unduly hampered by the protective order.

(b) The Commonwealth shall respond to the motion within seven days of the filing of the motion.

(c) Upon a finding that the defendant has made a prima facie case that the records are not privileged and that pretrial preparation is unduly hampered by the protective order, the court shall conduct a hearing on the motion.

(d) The privilege holder, the record holder, defense counsel and the Commonwealth may be heard on the question of whether the records are privileged.

(e) In the court finds that some or all of the records are not privileged, the protective order as it applies to those records shall be lifted.

Commentary

(d) *If the defendant files a motion seeking a privilege determination by the court, the court must notify the record holder and the privilege holder of the time and date of the hearing.*

A judicial finding that records are privileged must be in writing and must specify the statute or other provisions pursuant to which the records are privileged. Commonwealth v. Pare, 427 Mass. 427, 429-430 (1998).

8. Disclosure of information from third party records at trial.

- a) The defendant or the Commonwealth shall file a motion *in limine* seeking the permission of the trial judge to introduce information obtained from third-party records at trial. The motion must be in writing and must be accompanied by an affidavit setting forth supporting reasons.
- b) The defendant must be permitted to disclose information obtained from third-party records, even if privileged, if the information is relevant and is otherwise admissible.
- c) The court shall make findings and rulings on the record or in writing. The court may set terms and conditions of disclosure, but should resolve any doubt in the defendant's favor.
- d) Motions to disclose records may be renewed during the course of trial.

Commentary

- a) Superior Court Standing Order 2-86(X)(as amended 2004) requires the Commonwealth and the defendant to file a joint pretrial memorandum flagging remaining disputed legal issues on the final pretrial conference date, which is fourteen days prior to the scheduled trial date. A request for leave to introduce information obtained from third party records at trial should be referenced in the joint pretrial memorandum, and should be filed on the date of the final pretrial conference.*
- (b) Relevant information, even if privileged, is admissible when offered by the defendant so long as its introduction complies with the rules of evidence. Liacos, P.J., Brodin, M., and Avery, M., Handbook of Massachusetts Evidence §4.1.2 at 109 (7th ed. 2003 Supp.) ("[E]vidence that is relevant is admissible unless barred by some statute, rule or policy of exclusion").*
- (d) In the event the defendant's motion in limine is denied, the defendant may renew his request to disclose the records during the course of trial.*

9. Preservation of Records for Appeal.

Any records produced by a third party pursuant to this rule, whether or not disclosed to counsel, should be retained by the clerk's office and marked as an exhibit for identification, in the event they are later needed for appellate review.

10. Alteration of Time Limits

In the interests of justice, judges may exercise their discretion to extend the time periods and otherwise alter the procedures set forth herein.

Timetable

THE PROVISIONS OF THIS RULE TAKE EFFECT UPON COMMONWEALTH COMPLIANCE WITH ALL MANDATORY AND DISCRETIONARY DISCOVERY ORDERS

Commentary

The defendant's motion seeking an order for access to third-party records may rely upon information obtained through both mandatory and discretionary discovery. Mass.R.Crim.P. 14(a)(1)(A) requires that the Commonwealth provide mandatory discovery to the defendant prior to or at the time of the pretrial conference. Mass.R.Crim.P. 11(a)(1)(A) and 13(d)(2)(A) require that any remaining defense discovery motions be filed within 7 days after the pretrial conference and be scheduled for a hearing within 7 days after filing. In the event the court allows the defendant's motion for discretionary discovery, the defendant must file his motion for an order for access to records within 14 days of receipt of discretionary discovery. In the event the court denies the defendant's motion for discretionary discovery, the defendant must file his motion for issuance of a subpoena to a third party within fourteen days after the denial. In the event the defendant seeks to proceed ex parte, appropriate adjustments must be made to the time frame.

Steps 1-2-3

a) Filing of defendant's motion for an order to produce records.

When: 14 days after Commonwealth compliance with mandatory and discretionary discovery

b) Filing of Commonwealth's response to defendant's request

When: 14 days after defendant's filing of a request for a subpoena

c) Hearing on the defendant's motion

When: 30 days after Commonwealth's filing of a response

d) Findings by court

Step 4

a) Return date on order to produce records

When: As ordered by the court (assume 45 days)

b) Hearing on motion by record-holder to modify or amend court order

Step 5

Inspection of records by attorneys

When: Forthwith upon production of records to the clerk of the court

Steps 6-7

a) Filing of request for disclosure of records to expert, investigator or other third party and/or filing of request for determination of privilege

When: 60 days prior to final pretrial conference

b) Opposing party's response to motions

When: 14 days after filing of motions

c) Hearing on motion

When: As ordered by the court

d) Order by court

Step 8

Filing of pretrial motions *in limine*

When: 14 days before trial date (final pretrial conference date)

Total: Between Commonwealth compliance with pretrial discovery orders and receipt of records: **89 days plus time taken by court to issue findings and rulings. 45 of these days are for record-holder response to court order.**

For determination of pre-trial use of records by defendant and/or privilege determination: **Within the time frame promulgated by the Time Standards for the pretrial conference and pretrial motions.**

FORM A

[To be separately submitted]

FORM B

INSTRUCTIONS TO RECORD HOLDERS WHO RECEIVE COURT ORDERS TO PRODUCE RECORDS IN CRIMINAL CASES

The Court has issued an order at the request of the defendant in a criminal matter that certain of your records be brought before the court by the return date indicated on the order. **You are required to respond to the court order on or before the return date.** Your response to the court order must comply with the following rules.

1. You must, if possible, **advise the person whose records are the subject of the order** that the court in the above-captioned case has ordered that his or her records be produced.
2. If you wish to **assert a privilege** as to some or all of the records subject to this court order, your assertion of privilege must be in the form of an affidavit which includes the following: (a) citation to the statute or constitutional provision which creates the privilege, and (b) the name, license number, and any other pertinent qualifications of the care provider. If portions of the records which are not privileged can be segregated without undue burden, please do so. A form for assertion of privilege is attached to these instructions. The affidavit asserting the privilege and any memorandum you wish to file in support of your claim of privilege **must be filed on or before the return date on the order.**
3. Whether or not you have made a claim of privilege, the **records ordered by the court must be delivered to the office of the clerk of the court on or before the return date** in sealed envelope(s) marked on the exterior with the name and docket number of the case, the name of the record holder, the name of the person whose records are contained in the envelope, a designation as to whether the records are privileged or not privileged, and the date on which the records are delivered to the court.
4. If you believe that compliance with the court order would be **unreasonable or oppressive** (Mass.R.Crim.P. 17(a)(2)), you may file a motion to vacate or amend the order, accompanied by an affidavit and/or memorandum setting forth the basis for your claim. The motion to vacate or amend the order, affidavit and any memorandum should be filed on or before the return date.
5. If you or your counsel files a motion to vacate or amend the order, **the court will schedule a hearing and will notify you of the date of the hearing. You must appear in court on the designated date prepared to argue the merits of your claims.**
6. If you claim that production of records would be oppressive, the records need not be turned over to the clerk of the court until the court rules on the claim. Otherwise the records should be produced to the court as described in paragraph 3.

ADDENDUM TO FORM B

COMMONWEALTH OF MASSACHUSETTS

COUNTY

SUPERIOR COURT CRIMINAL
ACTION NUMBER

COMMONWEALTH

v.

RECORD-HOLDER ASSERTION OF PRIVILEGE

(Name of record keeper), being duly sworn, hereby deposes and says:

1. On (date), I received an order from the court in the above-captioned matter.
2. I believe that the records to which the order applies are privileged pursuant to [for example, G.L. c. 233, §20B (psychiatrist-patient privilege)].
3. The records were created by (name), a [licensed psychiatrist]. (Name's) license number is (number).
4. The care-giver who created these records satisfies the requirements set forth in [the relevant privilege-creating statute].

SIGNED AND SWORN TO UNDER THE PAINS AND PENALTIES OF PERJURY THIS
DAY OF , 20 .

FORM C

PROTECTIVE ORDER

COMMONWEALTH OF MASSACHUSETTS

COUNTY

SUPERIOR COURT CRIMINAL
ACTION NUMBER

COMMONWEALTH

v.

PROTECTIVE ORDER

The court hereby orders defense counsel and the Commonwealth not to disclose the contents of the records received from (record holder) pertaining to (witness name) to any person or entity, either in court or outside of court, for any purpose, without first obtaining authorization from the court.

The court further orders that no copies of these records may be provided to or made by defense counsel or the Commonwealth without prior permission of the court.

In the event the court permits either party to obtain a copy of these records, any copy so provided may not itself be copied without the permission of the court. Copies held by counsel or distributed to any authorized person by counsel must be returned to the court upon resolution of the case.